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FM AMEMBASSY BANGKOK
TO RUEHC/SECSTATE WASHDC PRIORITY 4065
INFO RUCNASE/ASEAN MEMBER COLLECTIVE PRIORITY
RUEHBY/AMEMBASSY CANBERRA PRIORITY 6538
RUEHUL/AMEMBASSY SEOUL PRIORITY 2545
RUEHKO/AMEMBASSY TOKYO PRIORITY 8711
RUEHCHI/AMCONSUL CHIANG MAI PRIORITY 2924
RUCPDO/DEPT OF COMMERCE WASHINGTON DC PRIORITY
RUEATRS/DEPT OF TREASURY WASHINGTON DC PRIORITY
RUEHBS/USEU BRUSSELS PRIORITY

UNCLAS SECTION 01 OF 02 BANGKOK 000280

SIPDIS

SENSITIVE
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STATE FOR EAP/MLS AND EB
COMMERCE FOR EAP/MAC/OKSA
TREASURY FOR OASIA
STATE PASS TO USTR FOR WEISEL AND POSNER

E.O. 12958: N/A
TAGS: [EINV](#) [ETRD](#) [ECON](#) [TH](#)
SUBJECT: FOREIGN BUSINESS ACT AND THAILAND'S GATS
COMMITMENTS

REF: A. BANGKOK 261

[1](#)B. BANGKOK 152

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1.(U) This is an action request. See para. 5.

[1](#)2. (U) On January 15, a diplomatic note headed "Preliminary Explanation on the Proposed Amendment to the Foreign Business Act B.E. 2542" was received from the Ministry of Foreign Affairs:

Begin text of diplomatic note.

The Ministry of Commerce of Thailand has been receiving complaints, as well as requests, to investigate the various cases of alleged violation of the Foreign Business Act B.E. 2542 ("the Act") that foreign persons hold shares in excess of legally permitted percentage and/or abuse voting rights by disguising themselves as 'Thai' business. This allegation has led to formal investigations and commencement of legal proceedings by relevant authorities.

Amendment of the Act was therefore unavoidable in order to enable stricter compliance and to provide more effective enforcement of this law, as well as to prevent circumvention of its application and to provide clarification as to elements constituting a 'foreign' business.

To this end, on 9 January 2007, the Cabinet approved, in principle, the proposed amendment of the Act. The proposed amendment is now under consideration by the Council of State.

The proposed amendment comprises the following three components:

- Imposition of heavier fines on the conclusion that there is a circumvention of the application of the current Article 36, regarding the act of being 'nominee';
- Prohibition, for the purpose of considering that a business is 'Thai' , of the use of preferential voting rights for and by foreign shareholders to allow voting rights to reflect true equity participation permitted under the Act;
- Provision of flexibilities by having grandfathering

provision and allowing a short period of one to two years for adjustment by companies so as to fully comply with the new Act as amended and to avoid business interruption.

The new Act is expected to strengthen our supervising capacity and address previous loopholes, without being an unnecessary obstacle in attracting FDI.

Furthermore, the new Act will not in any way affect foreign business in the manufacturing industries, export businesses, as well as all BOI-promoted businesses and those set up pursuant to Thailand's international obligations/commitments.

End text of diplomatic note.

13. (SBU) An American lawyer with long experience dealing with the FBA made three initial observations regarding the points in the dip note. First, that changing the definition of 'alien' to include voting rights and not just shareholding is a key change in the law - not simply closing a "loophole" - and a tightening of limitations on inward investment. Second, the statement that the amendments will "not in any way affect foreign business in the manufacturing industries..." is incorrect. This is because many such companies have operations engaged in service, distribution or other critical activities ancillary to their prime activity. Also, many such companies have subsidiaries that own the land on which the manufacturing plant is built. The subsidiary real estate holding company would be captured under the amendments. Finally, he noted that the definition of 'nominee', arguably the key issue in this matter, is not addressed.

14. (SBU) In a meeting called by the EU mission and attended by diplomats and chamber of commerce representatives including the US, Australia, Japan, Germany, Norway, South Korea, UK and Singapore, the EU Minister-Counselor for Trade circulated the following draft letter for consideration with

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the intention of it being signed by the various ambassadors for delivery to Deputy Prime Minister Pridiyathorn:

Begin text of draft letter:

We would like to draw your attention to a matter of great concern to the foreign business community related to the "proposed Draft Amendment to the Foreign Business Act B.E. 2542", which was approved by the Thai cabinet on 9 January 2007, and to information given to us on its content. We may wish to review to other aspects of the proposed legislation at a later stage, once more complete information is made available to us.

However, at this stage, we wish to draw your immediate attention to a major element, namely the introduction of a new restriction limiting foreign control of companies (majority of voting rights). Besides its potential negative impact on foreign investment, such a change would go beyond the existing commitments undertaken by Thailand in its schedule of Specific Commitments in the field of Trade in Services under the GATS.

Indeed, according to this schedule of Specific Commitments, Thailand has undertaken national treatment commitments for a number of sectors, subject to one limitation only, which reads as follows: "No limitations as long as foreign equity participation does not exceed 49 percent."

It results that a company should be granted national treatment provided it meets the foreign equity criteria. Thus, the introduction of a new limitation based on the control of the company would go beyond Thailand's current commitments.

Therefore, we would like to urge you to renounce the use of the control and voting rights of a company as a criteria to

define it as a foreign company subject to the limitations under the FBA. Such a step would contribute to restoring the confidence of the foreign business community in Thailand as an open economy welcoming foreign investment respectful of its international trade commitments.

End text of draft letter.

15. (SBU) Action Request. We seek guidance as to the relevance of the GATS to Thailand's proposed amendments and, more specifically, whether the proposed amendments would be considered by the USG as a change in Thailand's commitments under the GATS. If these are considered material changes, we would appreciate Washington's views on what steps Thailand must take to notify and implement such changes under the applicable WTO procedures.
BOYCE